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IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR SENATOR EDWARD M. KENNEDY, SENATOR TOM HARKIN, SENATOR CHRISTOPHER J. DODD, SENATOR RUSSELL D. FEINGOLD, REPRESENTATIVE GEORGE MILLER, REPRESENTATIVE EDWARD J. MARKEY, REPRESENTATIVE MAJOR R. OWENS, REPRESENTATIVE LYNN C. WOOLSEY, REPRESENTATIVE DANNY K. DAVIS, REPRESENTATIVE RUSH HOLT, AND REPRESENTATIVE DENNIS KUCINICH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, and if so, under what circumstances, non-lawyer parents of a child with disabilities may prosecute an Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400 *et seq.*, case *pro se* in federal court.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This *amici curiae* brief is submitted in support of Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman. By letters filed with the Clerk of this Court, Petitioners and Respondent have consented to the filing of this brief.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are four United States Senators and seven members of the United States House of Representatives. Senator Edward M. Kennedy was an original sponsor of the 1975 Education for All Handicapped Children Act (EHA) and is Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee. Senator Kennedy

[1] As required by Rule 37.6 of this Court, counsel for *amici* submits the following: No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel made any monetary contribution toward the preparation or submission of this brief.

introduced the bill to reauthorize the Individuals with Disabilities Education Act (IDEA) in 2004 and introduced tl.e 1997 IDEA with Senator Tom Harkin and Senator Christopher J. Dodd.[2] Senator Harkin serves on the HELP Subcommittee on Education and Early Childhood Development and sponsored the IDEA in 2004. Senator Dodd also sponsored the IDEA in 2004 and is Ranking Member of the HELP Subcommittee on Education and Early Childhood Development. Senator Russell D. Feingold strongly supported the IDEA in both 1997 and 2004. As Ranking Member of the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Property Rights, Senator Feingold has a strong interest in access to justice issues.

Congressman George Miller is the Senior Democrat on the House Education and the Workforce Committee, one of the original authors of the 1975 EHA, and a supporter of the 1997 IDEA. Congressman Edward J. Markey has served in the House of Representatives since 1976 and is a strong supporter of the 1997 IDEA. Congressman Major R. Owens is a member of the House Committee on Education and the Workforce and supported the IDEA in 1997. Congresswoman Lynn C. Woolsey is a member of the House Committee on Education and the Workforce and the Senior Democrat on the Subcommittee on Education Reform, a position she held at the time of the 2004 IDEA reauthorization. She also supported the 1997 IDEA. Congressman Danny K. Davis is a member of the House Committee on Education and the Workforce and its Subcommittee on Education Reform and voted for the 1997 IDEA. Congressman Rush Holt is a member of the House Committee on Education and the Workforce. Congressman Dennis Kucinich is also a member of the House Committee on Education and the Workforce, as well as its Subcommittee on Education Reform. He repre-

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[2] Congress reauthorized and amended the IDEA in 2004. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. §§ 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

sents Ohio's 10th Congressional District, which includes the Winkelman family among its constituents and the Parma City School District, where this case originated.

Amici have a significant interest in seeing that the IDEA, like any law passed by Congress, is faithfully enforced. The Sixth Circuit Court of Appeals' decision in this case, if allowed to stand, would severely limit the rights of parents to ensure that their children with disabilities receive a free appropriate public education (FAPE) pursuant to the IDEA. This result would contravene the text of the statute, as well as Congress's purposes in enacting the IDEA.

Amici also have a significant interest in avoiding the need to expend legislative resources to amend a statute that is already clear on an issue. This interest would be adversely affected if the rule announced by the Court of Appeals in this case is upheld. A lengthy and expensive legislative effort would be required in order to amend the IDEA to restore parental rights.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously concluded that parents may not appear *pro se* in federal court to challenge a public school's failure to provide a FAPE to their child with disabilities, as mandated by the IDEA. This interpretation of the IDEA contradicts the plain language of the statute and the rich legislative history that accompanies this fundamental special education law.

In 1975, Congress enacted the EHA, a groundbreaking piece of legislation that reshaped the American educational landscape and remains the foundation of special education programs in all fifty states. Since 1975 and through the EHA's reenactment as the IDEA, Congress has jealously preserved a comprehensive set of safeguards that empowers parents to participate in the development and implementation of special education services for qualified children and to challenge a public school's non-compliance with the IDEA.

The IDEA recognizes parents as parties to all stages of administrative and judicial proceedings when disputes arise

between parents and schools. Thus, parents can be "parties aggrieved" by an adverse, local-level due process hearing under Subsection 1415(g) of the IDEA and consequently have the right to state-level administrative review. The statutory text and legislative history indicate that parents can likewise be "parties aggrieved" by adverse findings arising out of a state-level due process hearing under Subsection 1415(i)(2)(A). Thus, parents have the right to appeal that adverse decision by bringing a cause of action in federal court.

When a local school system violates the IDEA, the Act gives parents the right to initiate a civil suit regarding any matter relating to the provision of a FAPE for their child. In providing this cause of action, Congress expressly recognized the interest of parents in shaping the course and substance of their child's education, in receiving the same financial benefit of a public education as other parents, and in obtaining services guaranteed by the statute that enhance the opportunity of the child to mature into a self-sufficient adult. Thus, parents may independently assert their own right to the guarantee of a FAPE by suing in federal court. Pursuant to 28 U.S.C. § 1654, parents may represent themselves in such actions without the assistance of a lawyer.

Denying or circumscribing the types of claims that parents may bring under the statute has had the effect of denying parents the ability to mount a challenge to the denial of a FAPE when they lack the means to secure counsel for their child. When Congress passed and amended the IDEA over time, it clearly intended to provide parents with the authority to participate significantly in the development and provision of educational services for their child. This participation includes the right to challenge a local school system's failure to meet the standards set forth in the IDEA. Congress provided these rights to parents with the specific goals of easing the financial burden on families of children with disabilities and ensuring that those children receive the same free and appropriate public education as their peers without disabilities.

LEGISLATIVE BACKGROUND

In 1975, Congress enacted the EHA to guarantee families a FAPE for their children with disabilities. Prior to enactment of the EHA, children with disabilities had little or no right to public education. At the time the EHA was passed, Congress noted that "[t]here are over 8 million handicapped children in the United States; yet only 3.9 million are currently receiving an appropriate education; 1.75 million handicapped youngsters are receiving no aid at all; and 2.5 million children are receiving inadequate education." 121 Cong. Rec. 37024 (1975) (statement of Rep. Brademas). The little public education that was provided to students with disabilities was often pitiful. One noted education journalist recalled seeing, during a visit to a public school for handicapped children in 1975, "rows and rows of children and adults strapped to their chairs in a dimly lit room, a cacophony of moans and screams. Four or five attendants stood watch over what seemed to be about a hundred 'students.'" Merrow, *What's So Special About Special Education?*, Educ. Week, May 8, 1996, at 48. Two landmark rulings in 1972 established the constitutional equal protection rights of children with disabilities and led to the EHA's enactment.[3] In 1986, the EHA was amended, Pub. L. No. 99-372, 100 Stat. 796 (1986), and in 1990, was renamed the IDEA, Pub. L. No. 101-476, 104 Stat. 1103 (1990). The IDEA underwent comprehensive revision in 1997 and additional revisions in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

In the thirty years since passage of the EHA, this series of legislation has transformed American education. "When Congress first passed IDEA, disabled children were shuttered away. They had no place in our society. . . . [N]ow, 6.5 million children with disabilities attend public schools." 150 Cong. Rec. S11543 (daily ed. Nov. 19, 2004) (statement of

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[3] *See Pennsylvania Ass'n for Retarded Children* v. *Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

Sen. Kennedy). The IDEA provides the basis for all public education of children with disabilities in the United States today.

The IDEA sets forth a detailed process designed to ensure the right to a FAPE, beginning with the local educational agency's (LEA) identification and initial evaluation of a child who may be disabled. 20 U.S.C. § 1414(a)-(b). Once a child is assessed as disabled and determined to be eligible for special education services, the LEA convenes a meeting to develop an individualized education program (IEP) for the child. *Id.* § 1414(b)(4), (d). The IEP, among other things, delineates the child's current educational level, describes how the child's disability affects the child's ability to learn, sets annual goals for the child, explains how progress toward those goals will be measured, and lists "the special education and related services and supplementary aids and services . . . to be provided to the child." *Id.* § 1414(d)(1)(A)(i)(IV). Services must be provided to the child in accordance with an annually reviewed IEP, and the child is reevaluated at least every three years. *Id.* § 1414(a)(2)(B)(ii), (d)(4)(A)(i).

Parents have full participatory rights to shape the content of the IEP at every step of this process. A LEA must obtain informed consent from parents before evaluating the child and must notify parents of what procedures it proposes to use. 20 U.S.C. § 1414(a)(1)(D)(i)(I), (b)(1). "[I]nformation provided by the parent" must be examined as part of this evaluation. *Id.* § 1414(b)(2)(A), (c)(1)(A)(i). The determination of whether the child has a disability and his or her educational needs "shall be made by a team of qualified professionals and the parent of the child," known collectively as the "IEP team." *Id.* § 1414(b)(4)(A). Parents are full members of the IEP team and as such, for example, may recommend "other individuals who have knowledge or special expertise regarding the child" to be part of the team that develops the IEP and reviews the child's functional and academic performance. *Id.* § 1414(d)(1)(B). Parents also have the right to the attendance of every IEP team member at any IEP meeting. *Id.* § 1414(d)(1)(C)(i). In developing and reviewing the

child's IEP, the team must consider "the concerns of the parents for enhancing the education of their child." *Id.* § 1414(d)(3)(A)(ii); *see also id.* § 1414(d)(4)(A)(ii)(III). After the IEP is created, the LEA has no unilateral right to modify that IEP without first holding a team meeting. *Id.* § 1414(d)(3)(D). Parents have a right to an annual reevaluation of their disabled child, and LEAs must obtain parental consent before each such reevaluation. *Id.* § 1414(a)(2), (c)(3). In addition, parents have the right to "examine all records" relating to their child and to written prior notice in the parents' native language of certain actions by the LEA. *Id.* § 1415(b).

Parents who are dissatisfied with their child's IEP may file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). Voluntary mediation is available both before and after a complaint is filed. *Id.* § 1415(e). Both the parents and the LEA have the right to request an impartial due process hearing on the matters in the complaint. *Id.* § 1415(f)(1)(A). If the due process hearing is conducted by the LEA, "any party aggrieved" by the findings and decision may seek review from the state educational agency. *Id.* § 1415(g). Finally, Subsection 1415(i)(2)(A) provides that "any party aggrieved by the findings and decision" of the due process hearing or a state-level review has the right to bring a civil action in federal court.

The framework for these guarantees in the IDEA descends directly from the comprehensive set of safeguards that the EHA established in 1975. "Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents." S. Rep. No. 99-112, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799. This framework remains largely intact despite major revisions by the IDEA amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37, and the IDEA reauthorization of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

ARGUMENT

This case arose out of confusion among the courts of appeals as to whether parents may appear in federal court, without the assistance of counsel, as the legal representative of their minor child, who alleges violations of the IDEA as a named party. This confusion resulted from the misguided holdings of two courts of appeals that the IDEA provides only children with disabilities, and not their parents, with a cause of action to challenge in federal court the failure of a public school to provide a FAPE. *See Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998). In the wake of this clearly erroneous but binding precedent, parents had no ability to enforce the right to the FAPE that is at the heart of the IDEA, except by naming their child as a minor party and prosecuting the federal lawsuit as the child's next friend under Federal Rule of Civil Procedure 17(c). A problem arose, however, where non-lawyer parents could not afford, or did not prefer, to enlist the services of a lawyer to handle the matter and attempted to appear on a *pro se* basis to advocate for the rights of their child. LEAs argued that the IDEA did not expressly confer any right onto parents to present, *pro se*, a cause of action belonging to the child named in the complaint.

The debate concerning whether parents may serve in a *pro se* capacity to enforce IDEA rights asserted by a child with disabilities is largely irrelevant once one properly determines that a parent has a freestanding right to bring a cause of action in federal court for the LEA's failure to provide a FAPE for his or her child. As explained below, Congress expressly conferred a cause of action upon parents of children with disabilities to proceed individually as aggrieved parties in federal court if a LEA fails to provide a FAPE to their child. This cause of action available to parents is plainly expressed in the text of the IDEA and is strongly reinforced by the purposes and legislative history of the statute. In providing this cause of action, Congress recognized the interest of parents in guiding the course and

substance of their child's education, in receiving the same financial benefit of a public education as other parents, and in obtaining services guaranteed by the statute that enhance the opportunity of the child to mature into a self-sufficient adult. Parents may independently vindicate the guarantee of a FAPE by suing in federal court. Pursuant to 28 U.S.C. § 1654, parents may represent themselves in such actions without the assistance of a lawyer.

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE IDEA MANIFEST CONGRESSIONAL INTENT TO INCLUDE PARENTS AMONG "AGGRIEVED PARTIES" WHO MAY CHALLENGE VIOLATIONS OF THE IDEA

The IDEA provides two procedural levels in which parents may challenge violations of the IDEA, including the failure of a LEA to provide a FAPE for their child. The first level involves administrative proceedings challenging the denial of a FAPE before either a local or a state educational agency. The second level permits claims in federal court to challenge the administrative decisions made at the first level. Both avenues expressly contemplate that parents may initiate and prosecute the challenge as parties to the respective proceeding.

A. Parents Are Parties To Administrative Proceedings And May Appeal The Results Of Local Proceedings As "Aggrieved Parties" Under Subsection 1415(g)

In both the EHA and the IDEA, Congress consistently contemplated that parents would be parties at every stage of the administrative proceedings set forth in Section 1415 of the IDEA. Section 1415 requires state and local agencies to provide an administrative complaint process in which any party may "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." Pub. L. No. 94-142, § 615(b)(1)(E), 89 Stat. 773, 788 (1975) (codified as amended at 20 U.S.C. § 1415(b)(6)).

Congress understood that parents—and not their minor children—would initiate administrative proceedings. Thus, the statute explicitly referred to parents in connection with the complaint filed as part of those proceedings. For example, the statute of limitations provision in Subsection 1415(b)(6)(B) requires a complaint to be filed "not more than 2 years before the date the *parent* or public agency knew or should have known about the alleged action that forms the basis of the complaint." (Emphasis added.) Subsection 1415(b)(8) requires state educational agencies to develop a model form "to assist *parents* in filing a complaint"; Subsection 1415(c)(2)(B) requires LEAs to respond to a "*parent's* due process complaint notice" within 10 days of receiving it; and Subsection 1415(d)(2) mandates that educational agencies provide "a full explanation of the procedural safeguards, written in the native language of the *parents*." (Emphases added.) *See also* 34 C.F.R. § 300.507(a)(1) ("A parent or a public agency may file a due process complaint[.]").[4]

After the complaint is filed, "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1)(A). Section 1415 contains numerous references to parents as parties in due process hearings. For example, Subsection 1415(e)(2)(A)(ii) ensures that "the mediation process . . . is not used to deny or delay *a parent's right* to a due process hearing." (Emphasis added.) The Senate Committee on Health, Education, Labor, and Pensions discussed this parental right in its report on the 2004 revisions of the IDEA:

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[4] *See also Honig* v. *Doe*, 484 U.S. 305, 311-312 (1988) ("[T]he [EHA] establishes various procedural safeguards [for] parents. . . . These safeguards include . . . an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education."); *Lillbask ex rel. Mauclaire* v. *Connecticut Dep't of Educ.*, 397 F.3d 77, 82 (2d Cir. 2005) ("IDEA requires states to provide a disabled child's parent or guardian with 'an opportunity to present complaints.'").

> The statutory language of IDEA makes clear that a parent has a right to file a due process complaint and to have the opportunity for a due process hearing. It is unquestioned that parents have the right to bring a complaint and participate in a due process hearing without an attorney.

S. Rep. No. 108-185, at 41 (2003).

If a LEA or an intermediate educational unit conducts the due process hearing, the IDEA gives "any party aggrieved by the findings and decision" the right to appeal those findings to the state educational agency. 20 U.S.C. § 1415(g); *see also* Pub. L. No. 94-142, § 615(c), 89 Stat. 789. Because parents are plainly parties to any due process hearing arising out of a due process complaint, courts consistently hold that parents are "parties aggrieved" by an adverse decision in those proceedings, and are entitled under Subsection 1415(g) to a state-level administrative appeal to challenge any findings or decision made in the local-level due process hearing. *See Maroni* v. *Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 251-252 (1st Cir. 2003); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1064 (10th Cir. 2002); *Board of Educ.* v. *Kelly E. ex rel. Nancy E.*, 207 F.3d 931, 935 (7th Cir. 2000).

B. Parents Are Also "Aggrieved Parties" Under Subsection 1415(i)(2)(A) With The Right To Appeal Administrative Decisions To Federal Court

1. Subsection 1415(i)(2)(A) permits the same persons to challenge the same violations as may be challenged under Subsection 1415(g)

Subsection 1415(i)(2)(A) permits federal courts to review the outcome of due process hearings. This subsection of the Act provides that "[a]ny party aggrieved by the findings and decision made [in a due process hearing under Subsection (f)], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section." In several pertinent respects, this language precisely mirrors that of Subsection 1415(g) discussed above. First, both

subsections refer to "any party aggrieved." Second, both subsections define the event from which the party is aggrieved in the same way—the party must be aggrieved by "the findings and decision" made "under [Subsection (f)]." The distinction between these two provisions concerns the structure of the state administrative process: where a state provides that a LEA must conduct the due process hearing contemplated by Subsection 1415(f), aggrieved parties must first appeal to a statewide educational agency before proceeding to federal court. If a state provides a Subsection 1415(f) hearing by a statewide educational agency in the first instance, aggrieved parties may proceed immediately to federal court. But aside from the differing procedures applicable in different states, the grievance and the parties aggrieved are textually identical in Subsections 1415(g) and 1415(i)(2)(A).

It is a normal presumption of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). Therefore it is presumed that, absent plain language to the contrary, if parents are "parties aggrieved" in one subsection of Section 1415—the administrative appeal process in Subsection (g)—then they are also "parties aggrieved" for purposes of another subsection of Section 1415—the federal court review of the due process hearing in Subsection (i)(2)(A). *See Maroni*, 346 F.3d at 252.

The IDEA contains no indication that Congress intended the term "party aggrieved" to have different meanings in Subsections 1415(g) and 1415(i)(2)(A). For years, states and courts have recognized that a parent may be a party aggrieved under Subsection 1415(g) and may appeal any adverse decision with respect to the findings and decision rendered in a local-level due process hearing. *See Maroni*, 346 F.3d at 251-252; *Cudjoe*, 297 F.3d at 1064; *Kelly E. ex rel. Nancy E.*, 207 F.3d at 935. Indeed, the "party aggrieved" language in the IDEA was imported directly from its predecessor statute, the EHA. When the IDEA was

passed and this term was imported from the EHA into the IDEA, courts had "almost uniformly permitted parents to sue"—with or without the assistance of counsel—to enforce the right to a FAPE under the EHA. *Maroni*, 346 F.3d at 250; *see also Kruelle* v. *New Castle County Sch. Dist.*, 642 F.2d 687, 690 & n.4 (3d Cir. 1981) (allowing parents to proceed *pro se*, without discussion, in case challenging provision of FAPE to their son under the EHA; noting without discussion that "20 U.S.C. § 1415(e)(2) provides that any party aggrieved by an agency decision shall have the right to bring a civil action . . . in a district court"); *Gregory K.* v. *Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987) (allowing parents to proceed *pro se*, without discussion, in case challenging provision of FAPE to their child under the EHA); *Rettig* v. *Kent City Sch. Dist.*, 788 F.2d 328 (6th Cir. 1986) (same); *Schreiber* v. *Ridgewood Bd. of Educ.*, 952 F. Supp. 205 (D.N.J. 1997) (same); *Muth* v. *Central Bucks Sch. Dist.*, 839 F.2d 113 (3d Cir. 1988) (same), *rev'd on other grounds sub nom., Dellmuth* v. *Muth*, 491 U.S. 223 (1989).

Courts that implicitly have concluded that parents cannot be "parties aggrieved" under Subsection 1415(i)(2)(A) to the extent that they challenge the failure to provide a FAPE, *see Cavanaugh*, 409 F.3d at 756; *see also Collinsgru*, 161 F.3d at 234-235, have simply ignored both the parallelism of Subsections 1415(g) and 1415(i)(2)(A) as well as the plain textual right of "part[ies] aggrieved" to challenge in federal court "the findings and decision made . . . with respect to the complaint," 20 U.S.C. § 1415(i)(2)(A). These courts do not and cannot explain their conclusion—that parents may not challenge the failure to provide a FAPE in federal court—in the face of the plain text of Subsection 1415(g), which states that parents may be parties aggrieved who may challenge that same right before a state reviewing body.

2. The IDEA requires parents to file administrative claims and to exhaust all such remedies before appealing to federal court, which indicates that parents are intended to be parties to federal judicial review of those claims

Under the IDEA, an "aggrieved party" must generally exhaust all administrative remedies before initiating a civil suit. *See, e.g.*, 20 U.S.C. § 1415(*l*) ("the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter"); *Maroni*, 346 F.3d at 251 n.5.

Just as Congress understood that parents would be the initiators of administrative proceedings regarding their children's education, so too did Congress understand that it would be parents who would exhaust those remedies. The legislative record reflects this analysis: the Senate Committee on Labor and Human Relations, in reporting on proposed attorneys' fees amendments to the EHA, explained that "under the EHA *parents* must generally exhaust administrative remedies to attempt to resolve certain disagreements before filing a civil court action." S. Rep. No. 99-112, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1805 (emphasis added). Furthermore, as the House Committee on Education and Labor explained, "Congress, by establishing a comprehensive scheme of procedural protections under EHA . . . expected that in appropriate situations these procedures would be used before a *parent* or guardian filed a law suit [sic]." H.R. Rep. No. 99-296, at 4 (1985) (emphasis added); *see also id.* at 7 ("Typically, a *parent* is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." (emphasis added)).

This provision and its legislative history indicate that Congress saw parents as the initiators of, and therefore parties to, federal judicial review of administrative proceedings under the IDEA.

3. The IDEA envisions federal courts having jurisdiction over parents as parties

The IDEA expressly acknowledges that parents can bring individual causes of action. For example, Sections 1401(10)(E) and 1412(a)(14)(E) read in part: "Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter[.]"

Furthermore, the IDEA explicitly permits parents to resolve IDEA disputes by agreement with the local school system and confers federal jurisdiction over those parent-school agreements. Specifically, Subsections 1415(e)(2)(F) and 1415(f)(1)(B)(iii) provide that—in the event that an agreement is reached during either the mediation process or a resolution session—"the parties shall execute a legally binding agreement[,] . . . signed by both the parent and a representative of the agency[,] . . . [that is] enforceable in any State court of competent jurisdiction or in a district court of the United States."

Finally, Congress passed amendments in 1986 and 2004 that expressly recognize parents as possible "prevailing parties" in civil litigation. The Handicapped Children's Protection Act of 1986 amended the EHA to authorize the award of reasonable attorneys' fees to prevailing parties in litigation. The amendment provides that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees . . . to the parents or guardian of a handicapped child or youth who is the prevailing party." Pub. L. No. 99-372, § 615(e)(4)(B), 100 Stat. 796 (1986). With this provision, Congress sought to allow courts to award "reasonable attorney fees to prevailing parents in an EHA [civil] action or [administrative] proceeding." S. Rep. No. 99-112, at 12, 1986 U.S.C.C.A.N. at 1802. Congress also plainly envisioned parents as initiating parties to civil actions. *See id.* at 14, 1986 U.S.C.C.A.N. at 1804 ("While the committee has no evidence that parents bring EHA suits which are frivolous, unreasonable, or without foundation, in the rare instance where this occurs, this [principle that a

party who brings a frivolous suit may be liable for the prevailing defendant's attorneys' fees] would apply.").

This analysis is reaffirmed by the 2004 amendments, which expressly provide that attorneys' fees may be awarded "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(I); *see* S. Rep. No. 108-185, at 2 ("In 1986, P.L. 99–372 authorized attorneys' fees for parents who prevail in due process proceedings and judicial actions against school districts.").

There is no indication either in the IDEA or its legislative history that Congress meant to exclude parents from the process of federal judicial review. Rather, as the administrative exhaustion and attorneys' fees provisions demonstrate, quite the opposite is true. Congress contemplated throughout Section 1415 that parents would be the prosecutors of federal court actions.

II. PARENTS ARE "AGGRIEVED PARTIES" WITH A RIGHT OF ACTION WHETHER THEIR CLAIMS ASSERT "PROCEDURAL" OR "SUBSTANTIVE" VIOLATIONS OF THE IDEA

Several courts of appeals have acknowledged, properly, that parents may be parties aggrieved under Subsection 1415(i)(2)(A) but have erroneously differentiated between parents' rights to bring "procedural" claims under the Act, which they have held to be actionable, versus "substantive" claims, which they either have held or implied that parents may not assert. *See, e.g.*, *Mosely* v. *Board of Educ.*, 434 F.3d 527, 532, 535 (7th Cir. 2006); *Collinsgru*, 161 F.3d at 230-236; *Wenger* v. *Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-126 (2d Cir. 1998). This distinction does not appear in the statute itself and runs counter to the plain language of the statute, which in many places makes clear that parents have an independent, substantive right to a FAPE for their child. The legislative history of the Act confirms this reading and militates against any such formalistic interpretation of the Act.

A. The IDEA Gives Parents The Right To Challenge In Federal Court Any Matter Relating To The Provision Of A FAPE For Their Child

Under the EHA, aggrieved parties possessed "the right to bring a civil action with respect to *the complaint presented pursuant to this section*, which action may be brought in . . . a district court of the United States without regard to the amount in controversy." Pub. L. No. 94-142, § 615(e)(2), 89 Stat. 789 (emphasis added). Under the EHA, *the complaint presented pursuant to this section* could raise "*any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* § 615(b)(1)(E) (emphasis added). As discussed *supra* pp. 9-11, in enacting the EHA, Congress understood and intended that parents would be the parties presenting such complaints. Thus, the claims to be presented in a complaint are the full panoply of claims that Congress intended to recognize as appropriate for administrative challenge, including the claim that the LEA has denied a child the right to a FAPE. *See* S. Rep. No. 94-455, at 48-49 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 1480, 1502 ("[L]anguage is adopted to assure that . . . any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child." (emphasis in original)).

Subsequent enactments and revisions of both the EHA and IDEA have in no way narrowed the broad scope of claims that may be presented in a complaint under this section. 20 U.S.C. § 1415(b)(6). The IDEA, as amended in 2004, provides that the administrative decision on the complaint "*shall* be made on substantive grounds based on a determination of whether the child received a free appropriate public education." *Id.* § 1415(f)(3)(E)(i) (emphasis added). Put another way, the goal of the administrative hearing is to evaluate the core substantive issue in any proceeding under the IDEA—whether the child with disabilities is receiving

an education that appropriately meets his or her educational needs and therefore constitutes a FAPE.[5]

Because (1) the section of the Act authorizing federal court review of administrative decisions in no way delineates or limits the grounds on which that review may be sought, and (2) those administrative decisions are required to be "made on substantive grounds based on a determination of whether the child received a free appropriate public education," parents who seek judicial review of those administrative decisions necessarily seek judicial review of substantive findings. 20 U.S.C. § 1415(f)(3)(E)(i). The distinction between "substantive" and "procedural" claims in civil litigation under the Act is therefore a distinction with no basis in the Act itself.

B. Congress Conferred On Parents A Right To A FAPE For Their Child That Is Independent Of The Child's Interest In A FAPE

Subsection 1400(d)(1)(B) of the Act states that one of the central purposes of Congress in enacting the EHA and IDEA is "to ensure that *the rights of* children with disabilities and *parents of such children* are protected." (Emphasis added.) *See also* 20 U.S.C. § 1400(c)(3) (stating that since enactment of the EHA, this legislation "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education"). In identifying the need to protect the rights of parents and not just those of their children, Congress specifically indicated that parents have rights under the Act that are separate from and independent of their children's rights. This conclu-

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[5] Indeed, if the complaint alleges only procedural inadequacies, "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii).

sion is borne out by the many rights guaranteed to parents throughout the Act.[6]

The EHA defined a FAPE as "*special education* and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required [under this title]." Pub. L. No. 94-142, § 602(a)(18), 89 Stat. 775 (emphasis added). Likewise, the Act defined "special education"—as used in the definition of FAPE—as "specially designed instruction, *at no cost to parents or guardians*, to meet the unique needs of a handicapped child." *Id.* § 602(a)(16) (emphasis added). The current legislation, as amended, includes the same definitions of

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[6] That parents have independent rights to a FAPE under the IDEA in no way diminishes the rights of children under the Act, who have their own right to a FAPE. *See* 20 U.S.C. § 1400(d)(1)(A), (d)(1)(B). Several sections of the IDEA explicitly recognize that some children with disabilities may not have parents able or willing to act for them and instead may have legal guardians or foster parents, or be wards of the state. *See, e.g.*, *id.* § 1415(b)(2) (requiring states and LEAs to establish procedures to protect the rights of children whose parents are unknown, cannot be located, or are wards of the State, including "assignment of an individual to act as a surrogate for the parents"). In such cases, Rule 17(c) of the Federal Rules of Civil Procedure, which allows a parent or guardian to "sue or defend on behalf of" a minor, would be a necessary avenue for these children to challenge the denial of a FAPE in federal court. The IDEA also contemplates that parents may choose to plead a federal cause of action by naming the child as the aggrieved party and acting as a next friend, a decision that might be made for any number of reasons. Indeed, this style of pleading became necessary after two courts of appeals held that parents could not maintain a cause of action challenging the provision of a FAPE. *See Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *see also Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998). However, the availability under the IDEA of a cause of action for a child with disabilities does not preclude the ability of parents to choose to challenge violations of their own rights under the IDEA in federal court on a *pro se* basis.

FAPE and special education. 20 U.S.C. § 1401(9), (29). By defining a FAPE in this way, Congress set forth two principal components of a FAPE directly tied to parents: (1) services provided without charge to the parents; and (2) services provided in conformity with the IEP required under the IDEA.

1. Congress recognized that parents suffer concrete financial injury when educational agencies fail to comply with the IDEA

In mandating the provision of a free education to children with disabilities, Congress sought to equalize the disparity between: (1) families of children without disabilities, who may rely on public education to avoid the costs of a private school education; and (2) families of children with disabilities who, before the enactment of the EHA, "were often forced to find services outside the public school system, often at great distance from their residence and at their own expense." Pub. L. No. 105-17, § 601(c)(2)(E), 111 Stat. 37, 39 (1997) (codified as amended at 20 U.S.C. § 1400(c)(2)(D)).

"Congress knew that there would be instances where parents would be denied the free appropriate public education to which their handicapped child was legally entitled." 131 Cong. Rec. S1979 (daily ed. Feb. 6, 1985) (statement of Sen. Weicker). Therefore, explained the Senate Committee on Labor and Public Welfare in 1975,

> [i]f a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under [this legislation] applies.

S. Rep. No. 94-168, at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1456.

In 1985, this Court held that by authorizing courts to grant appropriate relief in IDEA cases, "Congress meant to include retroactive reimbursement to parents [of private school expenses] as an available remedy in a proper case." *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 370 (1985). The 1997 amendments to the IDEA codified the right of parents to seek reimbursement of tuition expenses incurred as the result of an unlawful denial of a FAPE. Pub. L. No. 105-17, § 612(a)(10)(C)(ii), 111 Stat. 63. As amended, the IDEA provides:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id. (codified as amended at 20 U.S.C. § 1412(a)(10)(C)(ii)).

By providing that parents may be reimbursed when their child has been denied a FAPE, Congress explicitly recognized that parents themselves have a financial stake in—and attendant rights to—their child's education. The right of reimbursement runs to the parents and depends upon an evidentiary showing that the public school system has failed in its duty to provide a FAPE. This right is not implied; it is express (at least after the 1997 codification of the remedy allowed in *Burlington*). Furthermore, it is not procedural in nature; it is quintessentially a substantive right of parents to secure the public benefit of a quality education for their children that is funded by the parents' tax dollars.

2. Congress gave parents the right to shape the course and substance of the IEP—a necessary substantive component of a FAPE

"[C]onformity with the [IEP]" is an essential component of the provision of a FAPE. 20 U.S.C. § 1401(9)(D) (defining FAPE to constitute services "provided in conformity with the individualized education program required under section 1414"); *see id.* § 1414(d) (governing the development, review, and revision of the IEP). As discussed *supra* at pp. 6-7, parents have extensive rights in developing and modifying the IEP.

The Senate Labor and Public Welfare Committee, in reporting on the 1975 EHA, explained that "the Committee intends to ensure adequate involvement of the parents or guardian of the handicapped child, and the child (when appropriate) in both the [IEP] statement and its subsequent review and revision." S. Rep. No. 94-168, at 11, 1975 U.S.C.C.A.N. at 1435. In the same report, the Committee explained that it intended that the IEP meetings "be utilized as an extension of the procedural protections guaranteed under existing law to parents of handicapped children." *Id.* By giving parents of children with disabilities the right to participate in the design of the IEP, the EHA gave them a voice in the development of an appropriate education for their child.

Subsequent enactments have consistently expanded parents' rights to contribute to the design and implementation of an IEP. "[T]he concerns of the parents for enhancing the education of their child" must be considered in developing the child's IEP. 20 U.S.C. § 1414(d)(3)(A)(ii). In addition, the IEP must be revised as appropriate to address "information about the child, provided to, or by, the parents." *Id.* § 1414(d)(4)(A)(ii)(III). Under the current codification, parents are full members of the IEP team and decide, for example: who may be excused from IEP meetings, *id.* § 1414(d)(1)(C)(i); whether alternative means of meeting participation, such as video or teleconference, may be used, *id.* § 1414(f); and whether a child's current IEP may be

amended or modified without convening an IEP meeting, *id.* § 1414(d)(3)(D).

In conferring ever-expanding participatory rights upon parents in designing an appropriate education for their child, Congress made clear that parents themselves have a right to ensure that the FAPE provided to the child conforms to the IEP that they themselves have the right to help shape and challenge, if inadequate. This parental right to shape the educational program is independent of a child's right to receive a quality education.

3. Congress gave parents an independent right to their child's FAPE, because Congress recognized that parents themselves have a vested interest in their children with disabilities becoming self-sufficient adults

The IDEA is a civil rights statute based on the congressional recognition that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub. L. No. 94-142, § 601(b)(9), 89 Stat. 775; *see also* 150 Cong. Rec. H10013 (daily ed. Nov. 19, 2004) (statement of Rep. Miller) ("For me and for millions of American families, IDEA is more than an education law; it is a pact that never again will we abandon special needs children and cut them off from the educational services they need and deserve."). Improving educational results for children with disabilities is an "ongoing obligation" of the federal government, because education enables "those children to lead productive and independent adult lives." 20 U.S.C. § 1450(1). In fact, preparing children with disabilities for "further education, employment, and independent living" is the policy driving the IDEA guarantee of a FAPE. *Id.* § 1400(d)(1)(A); *see also* 150 Cong. Rec. S11543 (daily ed. Nov. 19, 2004) (statement of Sen. Kennedy) ("America is coming to understand that disabled does not mean unable—that we shortchange our communities when we deny them the gifts and contributions of those with disabilities.").

However, enabling children with disabilities to reach their full potential is also directly in the interest of these children's parents. *See* 150 Cong. Rec. S11543 (statement of Sen. Kennedy) ("America is coming to know what parents of disabled children have known all along—that their children have hopes and dreams, just like every other child—that they have parents who love them and want the best for their children, just like any other parent."); 150 Cong. Rec. H10013 (daily ed. Nov. 19, 2004) (statement of Rep. Miller) ("I was one of the original authors of the legislation in 1975 that made an historic commitment to the special needs children of the country—and their parents—to assure them the opportunity for a public education that would allow them to take full advantage of their gifts and have a full opportunity to participate in American society."). Not only do parents of children with disabilities wish to see their children flourish, parents will bear the primary economic burden of providing for their adult children if the children do not receive an education that prepares them for employment and independent living.

Because the goals of parents and society are aligned in ensuring that children with disabilities receive the education that enables them to become self-sufficient adults, Congress recognized that parents, in partnership with state and local educational agencies, "are in the best position to improve education for children with disabilities and to address their special needs." 20 U.S.C. § 1450(3). Accordingly, Congress gave parents of children with disabilities special rights to effect this educational goal, as well as resources to ensure "parents receive training and information designed to assist the children . . . in preparing to lead productive independent adult lives." *Id.* § 1470(1); *see also id.* §§ 1471(b)(1)(B), 1472(a)(1)(B).

Congress recognized in the IDEA that both parents and society share the goal of children with disabilities attaining self-sufficiency; Congress gave parents rights under the IDEA to effect this goal for their children.

C. The Structure Of The IDEA Affirms The Right of Parents To Make Fundamental Decisions Regarding Their Child's Education

As Judge Roth recognized in her dissent in *Collinsgru*, parents have rights under the IDEA, which

> arise from the special nature of the relationship between parents and their children and from the role of parents in directing their children's education rights and opportunities.... In enforcing their own rights under the Act, parents are also acting on behalf of their child. This is so because parents are responsible for their children's education [and] are entitled to make fundamental decisions regarding that education.

Collinsgru, 161 F.3d at 237 (Roth, J., concurring in part and dissenting in part).

This analysis of the IDEA is borne out by the very structure of the IDEA, which recognizes the important role of parents in ensuring that their child receives an appropriate education. *See* S. Rep. No. 94-168, at 11-12, 1975 U.S.C.C.A.N. at 1435-1436 ("By changing the language of [the provision requiring development of an IEP], the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."); 132 Cong. Rec. H17611 (daily ed. July 24, 1986) (statement of Rep. Jeffords) ("All children have the right to a free and appropriate education. Parents have the right and responsibility to protect these rights. We must act to retain these rights."). The years of research and experience since the 1975 enactment have "demonstrated that the education of children with disabilities can be made more effective by ... strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." Pub. L. No. 105-17, § 601(c)(5)(B), 111 Stat. 39 (codified as amended at 20 U.S.C. § 1400(c)(5)(B)). Thus, ensuring that "parents have the necessary tools to im-

prove educational results for children with disabilities" has long been among the central purposes of the IDEA. Pub. L. No. 105-17, § 601(d)(3), 111 Stat. 42 (codified as amended at 20 U.S.C. § 1400(d)(3)).

In discussing the 1997 amendments, the Senate Committee on Labor and Human Resources explained that the procedural safeguards afforded parents under the IDEA "have historically provided the foundation for ensuring access to a free appropriate public education for children with disabilities." S. Rep. No. 105-17, at 25 (1997). By strengthening these safeguards in the 1997 and 2004 amendments, Congress reaffirmed the IDEA's core understanding that the child's right to receive an appropriate education is meaningless without a concomitant parental ability to enforce that right in court, if necessary. *See Maroni*, 346 F.3d at 255-256 ("The interpretation of parents as 'parties aggrieved' [under Subsection 1415(i)(2)(A)] for both procedural and substantive claims is further confirmed by the structure of IDEA, which relies upon the central role played by parents in assuring that their disabled child receives a free appropriate public education." (internal quotation marks omitted)).

Furthermore, limiting parents' right of action to procedural claims would certainly lead to litigation over whether certain claims under the Act are "substantive" or "procedural." As the First Circuit noted in *Maroni*—where the school district did not argue that the IDEA distinguished between substantive and procedural claims—"school districts . . . probably do not wish to spend their defense dollars litigating the issue of what is procedural and what is substantive, or what consequences follow from that determination." *See* 346 F.3d at 253. Congress deliberately elevated substance over form in the IDEA, preferring that resources be spent on the substantive guarantee of a FAPE. *See supra* pp. 17-18; *see also* H.R. Rep. No. 108-77, at 85 (2003) ("Litigation under the Act has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to protect the substantive rights of children with disabilities."); H.R. Rep. No.

108-77, at 86 (mediation and arbitration are encouraged "to speed the resolution time so that children with disabilities obtain the needed services and education in a timely manner").

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Nowhere in the IDEA is there a delineation between "procedural" and "substantive" rights of parents. Rather, the IDEA simply gives parents special and independent rights throughout the Act. Legislative history confirms that Congress did so, because it knew that parents had a financial and familial interest in securing a FAPE for their children with disabilities and were the persons best suited to direct and enforce those rights.

III. Nothing In The Legislative History Of The 2004 Amendments To The Act Affects A Parent's Right To Proceed *Pro Se* On Claims To Enforce Rights Under The IDEA

In 2003, the Senate Committee on Health, Education, Labor, and Pensions proposed the following amendment, which explicitly would have permitted parents to proceed *pro se* in federal court:

> Subject to subsection (m), and notwithstanding any other provision of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure), a parent of a child with a disability may represent the child in any action under this part in Federal or State court, without the assistance of an attorney.

S. Rep. No. 108-185, at 225.

With this new language, the Committee explained, it hoped "to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney." S. Rep. No. 108-185, at 42. However, this provision was omitted from the final bill without explanation.

As an initial matter, this proposal does not speak at all to the scope of a parent's individual right of action to make a

claim in federal court under the IDEA. But even as it addresses the separate question of a parent's right to prosecute *pro se* a claim brought in the name of the child, one cannot infer from the proposal that the 2004 Congress understood that the existing statute provided either no right or limited rights for parents to proceed *pro se* on behalf of a child. Nor may one infer from the omission of this provision from the final bill that Congress had concluded that this proposal would *expand* the rights available in the predecessor statute and then rejected such an expansion. The failure to enact this proposal is equally consistent with an inference that Congress understood the statute to contain that right already, and that enactment of the proposal would merely be surplusage. Thus, no conclusion may be drawn as to the intent of the 2004 Congress. Failure to enact this or any other proposal cannot be a basis from which one can infer the intent of an earlier Congress. *See Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (stressing "that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute" (internal quotation marks omitted)).

* * * * *

Interpreting the statute to preclude claims brought by parents challenging the denial of a FAPE in federal court would severely limit the ability of many families to enforce their rights under the IDEA. This would particularly affect families of modest means such as the Winkelmans, who are unable to pay for a private attorney but do not qualify for free legal services or for the appointment of a court-appointed attorney *in forma pauperis*. Such a result would run counter to the history and policies of the IDEA, which intended to ease the financial burden on families of children with disabilities and to ensure that children with disabilities receive the same free and appropriate public education as their peers without disabilities.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Sixth Circuit should be overturned.

Respectfully submitted.

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